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APPALACHIAN MOUNTAIN ADVOCATES

Great Horned Owl © Estate of Roger Tory Peterson

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February 17, 2015

S. Craig Boggs
President
Kanawha Energy Company
315 70th Street
Suite 200
Charleston, WV 25304

RECEIVED
2015 FEB 23 PM 2:14
OFFICE OF THE
EXECUTIVE SECRETARY

By Certified Mail – Return Receipt Requested

Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Violation of Terms and Conditions of West Virginia NPDES Permit WV0094226 and 60-Day Notice of Intent to File Citizen Suit Under the Federal Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations of Federal and State Regulations and Permit Conditions on West Virginia Surface Mining Permits S6700988 and U301290

Dear Mr. Boggs:

The Sierra Club, the Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy (hereinafter, collectively “Sierra Club”), in accordance with section 505 of the Clean Water Act (the “Act” or the “CWA”), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, hereby notify you that Kanawha Energy Company (“Kanawha Energy”) has violated, and continues to violate, “an effluent standard or limitation” under Section 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), by failing to comply with the terms of West Virginia/National Pollution Discharge Elimination System (“WV/NPDES”) Permit WV0094226. Furthermore, Kanawha Energy is in ongoing violation of section 301 of the Act, 33 U.S.C. § 1311, as a result of its discharge of selenium into West Virginia’s waters in an amount in excess of instream water quality standards. If, within sixty days of the postmark of this letter, Kanawha Energy does not bring its discharges into full compliance with the Act, Sierra Club intends to file a citizens’ suit seeking civil penalties for Kanawha Energy’s ongoing violations and for an injunction compelling it to come into compliance with the Act.

Sierra Club further notifies you, in accordance with section 502 of the federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, that Kanawha Energy is in ongoing and continuing violation of certain federal and state regulations promulgated under SMCRA and the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRMA" or the "State Act") and certain permit conditions on West Virginia Surface Mining Permits S600988 and U301290 as a result of its unlawful discharges of selenium into waters of the United States and its failure to adequately treat those discharges. If, within sixty days, Kanawha Energy does not bring itself into full compliance with SMCRA, the regulations promulgated under SMCRA and the WVSCMRMA, and Surface Mining Permits S600988 and U301290, Sierra Club intends to file a citizens' suit in federal court seeking an injunction compelling Kanawha Energy to come into compliance with the applicable statutes, regulations, and permits.

I. BACKGROUND

Kanawha Energy holds WV/NPDES Permit WV0094226 to regulate discharges from its Boomer Hollow Complex (Surface Mining Permits S600988 and U301290) in Fayette County, West Virginia. WV/NPDES Permit WV0094226 requires Kanawha Energy to monitor and report the selenium concentrations in its effluent from Outfall 001 regulated by that permit into Boomer Branch of the Kanawha River. Those streams are waters of the United States.

II. CLEAN WATER ACT VIOLATIONS

Section 301 of the CWA prohibits the discharge of any pollutant by any person, except in compliance with a permit. 33 U.S.C. § 1311. An exception to this prohibition is the discharge of pollutants in compliance with a permit under § 402 of the Act, the National Pollutant Discharge Elimination System (NPDES), which is administered in West Virginia by the Department of Environmental Protection. See 33 U.S.C. § 1342. A standard condition of every WV/NPDES permit issued in the state is that "[t]he discharge or discharges covered by [that] WV/NPDES permit are to be of such quality so as not to cause a violation of applicable water quality standards promulgated by 47 CSR 2." 47 C.S.R. § 30-5.1.f. That rule is consistent with federal regulations, which mandate that,

each NPDES permit shall include conditions meeting the following requirements when applicable. . . . (d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of CWA necessary to: . . . (1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

40 C.F.R. § 122.44.

West Virginia water quality standards, promulgated by 47 C.S.R. § 2, prohibit the discharge of pollutant that causes “Any . . . condition, . . . which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.” 47 C.S.R. § 2-3.2.i. Further, water quality standards mandate the protection of designated and existing uses, including the propagation and maintenance of fish and other aquatic life. See 47 C.S.R. §§ 2.21, 2-4.1, 2-6.1. To maintain these standards, West Virginia has established specific numeric criteria for selenium in order to protect the biological integrity of streams and the maintenance of aquatic life. Those standards include a chronic criterion of 5 µg/L and an acute criterion of 20 µg/L for selenium.

Reports submitted by Kanawha Energy under the terms of WV/NPDES Permit WV0094226 reveal that Kanawha Energy has discharged selenium into Boomer Branch of the Kanawha River from Outfall 001 regulated by WV/NPDES Permit WV0094226 in amounts that violate water quality standards and thus the condition in its permit to refrain from discharges that violate those standards. Appendix A to this notice sets forth the instances where Kanawha Energy has reported selenium concentrations at Outfall 001 that exceed the numeric selenium water quality criteria. Those data indicate that Kanawha Energy’s discharges have caused or contributed to violations of the chronic selenium water quality standard in Boomer Branch between July 2010 and December 2014. In the absence of evidence that Kanawha Energy has made any efforts to prevent future similar selenium-laden discharges from Outfall 001 of WV/NPDES Permit WV0094226, Sierra Club believes that Kanawha Energy has committed additional violations since December 2014 and is in continuous and ongoing violation of the terms and conditions of WV/NPDES Permit WV0094226, rendering it subject to a citizen suit under Section 505(a)(1).

III. SURFACE MINING VIOLATIONS

Section 502(a)(1) of SMCRA authorizes citizens to commence civil actions against any person alleged to be in violation of rules, orders, or permits issued pursuant to SMCRA. 30 U.S.C. § 1270(a)(1). Sierra Club alleges that Kanawha Energy is in continuous and ongoing violation of the following:

- (1) 38 C.S.R. § 2-14.5, promulgated under the State Act;
- (2) 30 C.F.R. §§ 816.41(a) and 817.41(a), promulgated under SMCRA;
- (3) 30 C.F.R. §§ 816.42 and 817.42, promulgated under SMCRA; and
- (4) The permit conditions incorporated into West Virginia Surface Mining Permits S600988 and U301290 by operation of 38 C.S.R. §

2-3.33.c, promulgated under the State Act.

Kanawha Energy's SMCRA-related violations began at least in July 2010, when it gained control of the Boomer Hollow Complex and its discharges from that complex continued causing violations of the selenium water quality standards.

A. BACKGROUND

In 1977, Congress enacted SMCRA in order to "assure that surface coal mining operations are so conducted as to protect the environment." 30 U.S.C. § 1202(d). SMCRA encourages "cooperative federalism" by allowing states to adopt their own programs for the regulation of mining, so long as those programs are as stringent as the federal program. See generally 30 U.S.C. § 1253. The Secretary of the Department of the Interior, charged with implementing SMCRA, has approved West Virginia's state mining regulation program. See 30 C.F.R. § 948.10. Consequently, West Virginia regulates mining operations in this state under article 3 of chapter 22 of the West Virginia Code and issues surface mining permits consistent with that statute.

To serve the statutory goal of environmental protection, SMCRA and the State Act impose performance standards on mining operations. Those standards are codified in 40 C.F.R. Parts 816 and 817, and 38 C.S.R. § 2-14. Kanawha Energy's violation of the performance standards will be the basis of any citizen suit under SMCRA.

B. KANAWHA ENERGY'S MINING OPERATIONS HAVE RESULTED IN WATER QUALITY STANDARDS VIOLATIONS

The federal performance standards under SMCRA mandate that all discharges from permitted mining operations "be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. Part 434." 40 C.F.R. §§ 816.42 & 817.42. The regulations under the State Act prescribe a similar standard: "Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards." 38 C.S.R. § 2-14.5.b (emphasis added).

Kanawha Energy's discharge monitoring reports for WV/NPDES Permit WV0094226 indicate that Kanawha Energy has discharged selenium from Outfall 001 regulated by that permit in amounts that have caused or contributed to violations of the chronic selenium water quality standards for that pollutant. Specifically, Kanawha Energy discharged selenium in excess of water quality standards as illustrated in Appendix A, causing instream violations of the chronic selenium water quality standard in Boomer Branch of the Kanawha River. Consequently, Kanawha Energy is in violation

of the federal and state performance standards regarding surface water discharges and is subject to a citizen suit under SMCRA.

Moreover, Kanawha Energy has a legal duty to treat its effluent to ensure that it does not violate water quality standards. Federal performance standards require that, “[i]f drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls.” 40 C.F.R. § 816.41(d)(1); see also 38 C.S.R. § 2-14.5.c (“Adequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with the requirements of subdivision 14.5.b of this subsection.”) The violations identified herein show unequivocally that Kanawha Energy’s existing treatment methods are insufficient to meet that requirement. Thus, the performance standards require Kanawha Energy to construct systems that will effectively treat its effluent to levels that comply with all applicable water quality standards.

C. KANAWHA ENERGY IS IN CONTINUOUS AND ONGOING VIOLATION OF THE CONDITIONS OF WEST VIRGINIA SURFACE MINING PERMITS S600988 AND U301290

Under the State Act, all of the performance standards set forth in the West Virginia Surface Mining Rule—including the performance standards discussed above—are incorporated as conditions in every permit issued under the act. 38 C.S.R. § 2-3.33.c. Kanawha Energy’s Surface Mining Permits S600988 and U301290 are associated with its unlawful discharges under WV/NPDES Permit WV0094226. By operation of 38 C.S.R. § 2-33.c, that surface mining permit incorporates the performance standards discussed in Section III.B *supra*. The upshot of that incorporation is that Kanawha Energy’s unlawful discharges and its failure to adequately treat its effluent are subject to regulation under the terms of its surface mining permits.

As described above, Kanawha Energy is violating the performance standards that prohibit violations of water quality standards and require adequate treatment to avoid such violations. See 40 C.F.R. §§ 816.41-816.42 & 817.41-817.42; 38 C.S.R. § 2-14.5. Consequently, it is simultaneously violating the conditions of Surface Mining Permits S600988 and U301290 and is subject to a citizen suit under SMCRA.

IV. CONCLUSION

As discussed above, if Kanawha Energy fails to come into compliance with the Clean Water Act, the terms of WV0094226, SMCRA, surface mining regulations, and the permit conditions of Surface Mining Permits S600988 and U301290, Sierra Club

intends to file a citizen suit under section 505(a)(1) of the Clean Water Act seeking civil penalties and injunctive relief, as well as a citizen suit under section 520(a)(1) of SMCRA seeking a court order compelling Kanawha Energy to come into compliance with the law. Sierra Club, through this notice letter, further reserves the right to seek civil penalties for any further violations of the CWA stemming from the issues identified herein that may have occurred since the last available DMRs were submitted or do occur after today. See Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995).

If Kanawha Energy has taken any steps to eradicate the underlying cause of the violations identified herein, or if they believe that anything in this letter is inaccurate, please let us know. If we are not advised of any remedial steps during the 60-day period, we will assume that no such steps have been taken and that violations are likely to continue. Additionally, we would be happy to meet with you or your representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,



Derek O. Teaney

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Ohio Valley Environmental Coalition

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cc (via certified mail, return receipt requested):

The Honorable Randy Huffman
Secretary
West Virginia Department of Environmental Protection
601 57th Street
Charleston, WV 25304

The Honorable Shawn M. Garvin
Regional Administrator
U.S. Environmental Protection Agency Region III
1650 Arch Street
Philadelphia, PA 19103-2029

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Honorable Sally Jewell
Secretary
United States Department of Interior
1849 C Street, N.W.
Washington, DC 20240

The Honorable Joseph Pizarchik
Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

Corporation Service Company
Registered Agent
Kanawha Energy Company
209 West Washington Street
Charleston, WV 25302

(via first class mail):
The Honorable Thomas Shope
Regional Director

Office of Surface Mining
Appalachian Regional Coordinating Center
3 Parkway Center
Pittsburgh, PA 15220

APPENDIX A**EXCEEDANCES OF SELENIUM WATER QUALITY STANDARDS BY
DISCHARGES REGULATED BY WV/NPDES PERMIT WV0094226****OUTFALL 001**

DATE	UNITS	MEASURED VALUE
July 2010	µg/l	6.31
August 2010	µg/l	8.96
December 2010	µg/l	7.21
January 2011	µg/l	8.01
February 2011	µg/l	6.23
March 2011	µg/l	5.13
August 2011	µg/l	5.66
September 2011	µg/l	5.74
October 2011	µg/l	5.29
November 2011	µg/l	5.25
January 2012	µg/l	5.03
April 2012	µg/l	5.21
May 2012	µg/l	5.69
June 2012	µg/l	5.32
July 2012	µg/l	8.62
August 2012	µg/l	7.7
September 2012	µg/l	8.41
October 2012	µg/l	8.35
November 2012	µg/l	8.1
December 2012	µg/l	7.69
January 2013	µg/l	6.88
February 2013	µg/l	5.67
March 2013	µg/l	6.71
April 2013	µg/l	5.6
May 2013	µg/l	7.69
June 2013	µg/l	7.68
July 2013	µg/l	8.03
August 2013	µg/l	7.4
September 2013	µg/l	7.52
October 2013	µg/l	10.1
November 2013	µg/l	8.37
December 2013	µg/l	6.8
January 2014	µg/l	5.94
February 2014	µg/l	5.4
April 2014	µg/l	5.03
May 2014	µg/l	6.92
June 2014	µg/l	9.18
July 2014	µg/l	6.79
August 2014	µg/l	7.83
September 2014	µg/l	10
October 2014	µg/l	8.81
November 2014	µg/l	7.49

December 2014

µg/l

8.62



APPALACHIAN MOUNTAIN ADVOCATES

Great Horned Owl © Estate of Roger Tony Peterson.

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February 17, 2015

Steven R. Poe
President
Highland Mining Company
P.O. Box 1098
Holden, WV 25625

By Certified Mail – Return Receipt Requested

Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Violation of Terms and Conditions of West Virginia NPDES Permit WV1020463 and 60-Day Notice of Intent to File Citizen Suit Under the Federal Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations of Federal and State Regulations and Permit Conditions on West Virginia Surface Mining Permit S500201

Dear Mr. Poe:

The Sierra Club, the Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy (hereinafter, collectively “Sierra Club”), in accordance with section 505 of the Clean Water Act (the “Act” or the “CWA”), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, hereby notify you that Highland Mining Company (“Highland”) has violated, and continues to violate, “an effluent standard or limitation” under Section 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), by failing to comply with the terms of West Virginia/National Pollution Discharge Elimination System (“WV/NPDES”) Permit WV1020463. Furthermore, Highland is in ongoing violation of section 301 of the Act, 33 U.S.C. § 1311, as a result of its discharge of selenium into West Virginia’s waters in an amount in excess of instream water quality standards. If, within sixty days of the postmark of this letter, Highland does not bring its discharges into full compliance with the Act, Sierra Club intends to file a citizens’ suit seeking civil penalties for Highland’s ongoing violations and for an injunction compelling it to come into compliance with the Act.

Sierra Club further notifies you, in accordance with section 502 of the

federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, that Highland is in ongoing and continuing violation of certain federal and state regulations promulgated under SMCRA and the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRMA" or the "State Act") and certain permit conditions on West Virginia Surface Mining Permit S500201 as a result of its unlawful discharges of selenium into waters of the United States and its failure to adequately treat those discharges. If, within sixty days, Highland does not bring itself into full compliance with SMCRA, the regulations promulgated under SMCRA and the WVSCMRMA, and Surface Mining Permit S500201, Sierra Club intends to file a citizens' suit in federal court seeking an injunction compelling Highland to come into compliance with the applicable statutes, regulations, and permits.

I. BACKGROUND

Highland holds WV/NPDES Permit WV1020463 to regulate discharges from its Georges Creek Surface Mine Number 1 (Surface Mining Permit S500201) in Logan County, West Virginia. WV/NPDES Permit WV1020463 requires Highland to monitor and report the selenium concentrations in its effluent from Outfall 001 regulated by that permit into an unnamed tributary of George's Creek, from Outfall 003 regulated by that permit into an unnamed tributary of George's Creek, and from Outfall 005 regulated by that permit into George's Creek. Those streams are waters of the United States.

II. CLEAN WATER ACT VIOLATIONS

Section 301 of the CWA prohibits the discharge of any pollutant by any person, except in compliance with a permit. 33 U.S.C. § 1311. An exception to this prohibition is the discharge of pollutants in compliance with a permit under § 402 of the Act, the National Pollutant Discharge Elimination System (NPDES), which is administered in West Virginia by the Department of Environmental Protection. See 33 U.S.C. § 1342. A standard condition of every WV/NPDES permit issued in the state is that "[t]he discharge or discharges covered by [that] WV/NPDES permit are to be of such quality so as not to cause a violation of applicable water quality standards promulgated by 47 CSR 2." 47 C.S.R. § 30-5.1.f. That rule is consistent with federal regulations, which mandate that,

each NPDES permit shall include conditions meeting the following requirements when applicable. . . . (d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of CWA necessary to: . . . (1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

40 C.F.R. § 122.44.

West Virginia water quality standards, promulgated by 47 C.S.R. § 2, prohibit the discharge of pollutant that causes “Any . . . condition, . . . which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.” 47 C.S.R. § 2-3.2.i. Further, water quality standards mandate the protection of designated and existing uses, including the propagation and maintenance of fish and other aquatic life. See 47 C.S.R. §§ 2.21, 2-4.1, 2-6.1. To maintain these standards, West Virginia has established specific numeric criteria for selenium in order to protect the biological integrity of streams and the maintenance of aquatic life. Those standards include a chronic criterion of 5 µg/L and an acute criterion of 20 µg/L for selenium.

Reports submitted by Highland under the terms of WV/NPDES Permit WV1020463 reveal that Highland has discharged selenium into unnamed tributaries of George’s Creek and into George’s Creek from Outfalls 001, 003, and 005 regulated by WV/NPDES Permit WV1020463 in amounts that violate water quality standards and thus the condition in its permit prohibiting discharges that violate those standards. Appendix A to this notice sets forth the instances where Highland has reported selenium concentrations at Outfalls 001, 003, and 005 that exceed the numeric selenium water quality criteria. Those data indicate that Highland’s discharges have caused or contributed to violations of the chronic and acute selenium water quality standards in unnamed tributaries of George’s Creek and in George’s Creek between August 2013 and December 2014. In the absence of evidence that Highland has made any efforts to prevent future similar selenium-laden discharges from Outfalls 001, 003, and 005 of WV/NPDES Permit WV1020463, Sierra Club believes that Highland has committed additional violations since December 2014 and is in continuous and ongoing violation of the terms and conditions of WV/NPDES Permit WV1020463, rendering it subject to a citizen suit under Section 505(a)(1).

III. SURFACE MINING VIOLATIONS

Section 502(a)(1) of SMCRA authorizes citizens to commence civil actions against any person alleged to be in violation of rules, orders, or permits issued pursuant to SMCRA. 30 U.S.C. § 1270(a)(1). Sierra Club alleges that Highland is in continuous and ongoing violation of the following:

- (1) 38 C.S.R. § 2-14.5, promulgated under the State Act;
- (2) 30 C.F.R. §§ 816.41(a) and 817.41(a), promulgated under SMCRA;
- (3) 30 C.F.R. §§ 816.42 and 817.42, promulgated under SMCRA; and
- (4) The permit conditions incorporated into West Virginia Surface

Mining Permit S500201 by operation of 38 C.S.R. § 2-3.33.c, promulgated under the State Act.

Highland's SMCRA-related violations began at least in August 2013, when it began measuring selenium concentrations in its discharges at the Georges Creek Surface Mine Number 1 that caused violations of the selenium water quality standards.

A. BACKGROUND

In 1977, Congress enacted SMCRA in order to “assure that surface coal mining operations are so conducted as to protect the environment.” 30 U.S.C. § 1202(d). SMCRA encourages “cooperative federalism” by allowing states to adopt their own programs for the regulation of mining, so long as those programs are as stringent as the federal program. See generally 30 U.S.C. § 1253. The Secretary of the Department of the Interior, charged with implementing SMCRA, has approved West Virginia's state mining regulation program. See 30 C.F.R. § 948.10. Consequently, West Virginia regulates mining operations in this state under article 3 of chapter 22 of the West Virginia Code and issues surface mining permits consistent with that statute.

To serve the statutory goal of environmental protection, SMCRA and the State Act impose performance standards on mining operations. Those standards are codified in 40 C.F.R. Parts 816 and 817, and 38 C.S.R. § 2-14. Highland's violation of the performance standards will be the basis of any citizen suit under SMCRA.

B. HIGHLAND'S MINING OPERATIONS HAVE RESULTED IN WATER QUALITY STANDARDS VIOLATIONS

The federal performance standards under SMCRA mandate that all discharges from permitted mining operations “be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. Part 434.” 40 C.F.R. §§ 816.42 & 817.42. The regulations under the State Act prescribe a similar standard: “Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards.” 38 C.S.R. § 2-14.5.b (emphasis added).

Highland's discharge monitoring reports for WV/NPDES Permit WV1020463 indicate that Highland has discharged selenium from Outfalls 001, 003, and 005 regulated by that permit in amounts that have caused or contributed to violations of the chronic and acute selenium water quality standards for that pollutant. Specifically, Highland discharged selenium in excess of water quality standards as illustrated in Appendix A, causing instream violations of the chronic and acute selenium water quality standards in unnamed tributaries of George's Creek and in George's Creek.

Consequently, Highland is in violation of the federal and state performance standards regarding surface water discharges and is subject to a citizen suit under SMCRA.

Moreover, Highland has a legal duty to treat its effluent to ensure that it does not violate water quality standards. Federal performance standards require that, “[i]f drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls.” 40 C.F.R. § 816.41(d)(1); see also 38 C.S.R. § 2-14.5.c (“Adequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with the requirements of subdivision 14.5.b of this subsection.”) The violations identified herein show unequivocally that Highland’s existing treatment methods are insufficient to meet that requirement. Thus, the performance standards require Highland to construct systems that will effectively treat its effluent to levels that comply with all applicable water quality standards.

C. HIGHLAND IS IN CONTINUOUS AND ONGOING VIOLATION OF THE CONDITIONS OF WEST VIRGINIA SURFACE MINING PERMIT S500201

Under the State Act, all of the performance standards set forth in the West Virginia Surface Mining Rule—including the performance standards discussed above—are incorporated as conditions in every permit issued under the act. 38 C.S.R. § 2-3.33.c. Highland’s Surface Mining Permit S500201 is associated with its unlawful discharges under WV/NPDES Permit WV1020463. By operation of 38 C.S.R. § 2-33.c, that surface mining permit incorporates the performance standards discussed in Section III.B supra. The upshot of that incorporation is that Highland’s unlawful discharges and its failure to adequately treat its effluent are subject to regulation under the terms of its surface mining permits.

As described above, Highland is violating the performance standards that prohibit violations of water quality standards and require adequate treatment to avoid such violations. See 40 C.F.R. §§ 816.41-816.42 & 817.41-817.42; 38 C.S.R. § 2-14.5. Consequently, it is simultaneously violating the conditions of Surface Mining Permit S500201 and is subject to a citizen suit under SMCRA.

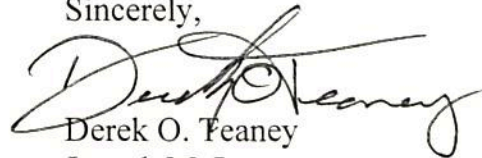
IV. CONCLUSION

As discussed above, if Highland fails to come into compliance with the Clean Water Act, the terms of WV1020463, SMCRA, surface mining regulations, and the permit conditions of Surface Mining Permit S500201, Sierra Club intends to file a citizen

suit under section 505(a)(1) of the Clean Water Act seeking civil penalties and injunctive relief, as well as a citizen suit under section 520(a)(1) of SMCRA seeking a court order compelling Highland to come into compliance with the law. Sierra Club, through this notice letter, further reserves the right to seek civil penalties for any further violations of the CWA stemming from the issues identified herein that may have occurred since the last available DMRs were submitted or do occur after today. See Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995).

If Highland has taken any steps to eradicate the underlying cause of the violations identified herein, or if they believe that anything in this letter is inaccurate, please let us know. If we are not advised of any remedial steps during the 60-day period, we will assume that no such steps have been taken and that violations are likely to continue. Additionally, we would be happy to meet with you or your representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,



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cc (via certified mail, return receipt requested):

The Honorable Randy Huffman
Secretary
West Virginia Department of Environmental Protection
601 57th Street
Charleston, WV 25304

The Honorable Shawn M. Garvin
Regional Administrator
U.S. Environmental Protection Agency Region III
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Philadelphia, PA 19103-2029

The Honorable Gina McCarthy
Administrator
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1200 Pennsylvania Avenue, N.W.
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The Honorable Sally Jewell
Secretary
United States Department of Interior
1849 C Street, N.W.
Washington, DC 20240

The Honorable Joseph Pizarchik
Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

Corporation Service Company
Registered Agent
Highland Mining Company
209 West Washington Street
Charleston, WV 25302

(via first class mail):
The Honorable Thomas Shope
Regional Director
Office of Surface Mining

Appalachian Regional Coordinating Center
3 Parkway Center
Pittsburgh, PA 15220

APPENDIX A**EXCEEDANCES OF SELENIUM WATER QUALITY STANDARDS BY
DISCHARGES REGULATED BY WV/NPDES PERMIT WV1020463****OUTFALL 001**

DATE	UNITS	MEASURED VALUE
August 2013	µg/l	11.6
August 2013	µg/l	16
September 2013	µg/l	12.4
September 2013	µg/l	14.1
October 2013	µg/l	9.38
October 2013	µg/l	10.8
November 2013	µg/l	6.18
November 2013	µg/l	14
December 2013	µg/l	5.24
January 2014	µg/l	11.9
January 2014	µg/l	13.5
February 2014	µg/l	12.3
February 2014	µg/l	14.9
March 2014	µg/l	11.2
March 2014	µg/l	23
April 2014	µg/l	14.6
April 2014	µg/l	17.4
May 2014	µg/l	11.6
May 2014	µg/l	12.4
June 2014	µg/l	11.4
June 2014	µg/l	13
July 2014	µg/l	9.24
July 2014	µg/l	16.5
August 2014	µg/l	14.7
August 2014	µg/l	15.6
September 2014	µg/l	12.2
September 2014	µg/l	15
October 2014	µg/l	14.5
October 2014	µg/l	15.5
November 2014	µg/l	12.4
November 2014	µg/l	15.9
December 2014	µg/l	14.4
December 2014	µg/l	15.9

OUTFALL 003

DATE	UNITS	MEASURED VALUE
August 2013	µg/l	9.96
December 2013	µg/l	5.98
December 2013	µg/l	7.94
January 2014	µg/l	7.01

January 2014	µg/l	8.45
March 2014	µg/l	15.4
April 2014	µg/l	5.26
April 2014	µg/l	8.23
May 2014	µg/l	7.61
July 2014	µg/l	9.02
August 2014	µg/l	6.23
September 2014	µg/l	5.72
October 2014	µg/l	8.06
October 2014	µg/l	10.1
December 2014	µg/l	5.34
December 2014	µg/l	6.52

OUTFALL 005

DATE	UNITS	MEASURED VALUE
December 2013	µg/l	13.2
December 2013	µg/l	17.1
January 2014	µg/l	19.1
February 2014	µg/l	15.3
February 2014	µg/l	25.8
March 2014	µg/l	16.8
April 2014	µg/l	16.5
August 2014	µg/l	16.1
September 2014	µg/l	14.5



APPALACHIAN MOUNTAIN ADVOCATES

Great Horned Owl © Estate of Roger Tony Peterson.

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February 17, 2015

John C. Brown
President
Alex Energy, Inc.
5363 Leivasy Road
Leivasy, WV 26676

By Certified Mail – Return Receipt Requested

Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Violation of Section 301(a) and 60-Day Notice of Intent to File Citizen Suit Under the Federal Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations of Federal and State Regulations and Permit Conditions on West Virginia Surface Mining Permit S505389

Dear Mr. Brown:

The Sierra Club, the Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy (collectively, “Sierra Club”), in accordance with section 505 of the Clean Water Act (the “Act” or the “CWA”), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, hereby notify you that Alex Energy, Inc. (“Alex Energy”) is in violation of Section 301 of the Act, 33 U.S.C. § 1311, as a result of the unpermitted discharge of selenium from Fill Number 1, Fill Number 2, and Fill Number 5 at the Whitman No. 2 Surface Mine (Surface Mining Permit S505389) in Logan County, West Virginia. The West Virginia/National Pollution Discharge Elimination System “WV/NPDES” permit associated with the Whitman No. 2 Surface Mine does not authorize selenium discharges from the toes of Fill Number 1, Fill Number 2, or Fill Number 5. If within sixty days of the postmark of this letter, Alex Energy does not bring its discharges into full compliance with the Act, either by obtaining and complying with a WV/NPDES permit with proper selenium effluent limitations on discharges from Fill Number 1, Fill Number 2, and Fill Number 5 or by ceasing to discharge selenium through treatment or otherwise, we intend to file a citizen suit under Section 505(a)(1) of the Act

seeking civil penalties for your ongoing violation and an injunction compelling you to comply with the Act.

Sierra Club further notifies you, in accordance with section 502 of the federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, that Alex Energy is in continuous and ongoing violation of certain federal and state regulations promulgated under SMCRA and the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA" or the "State Act") and certain permit conditions on West Virginia Surface Mining Permit S505389 for the Whitman No. 2 Surface Mine as a result of its unlawful discharges of selenium into waters of the United States from Fill Number 1, Fill Number 2, and Fill Number 5 and its failure to adequately treat those discharges. If, within sixty days, Alex Energy does not bring itself into full compliance with SMCRA, the regulations promulgated under SMCRA and the WVSCMRA, and Surface Mining Permit S505389, Sierra Club intends to file a citizen suit in federal court seeking an injunction compelling Alex Energy to come into compliance with the applicable statutes, regulations, and permits.

I. BACKGROUND

Alex Energy holds WV/NPDES Permit WV1008277 to regulate discharges from its Whitman No. 2 Surface Mine (Surface Mining Permit S505389). Alex Energy constructed Fill Number 1 at that mine in an unnamed tributary of Newsome Branch of Trace Fork of Island Creek of the Guyandotte River. Alex Energy constructed Pond 1A of the Whitman No. 2 Surface Mine in the unnamed tributary of Newsome Branch to treat discharges from Fill Number 1. Outfall 001 of WV/NPDES Permit WV1008277 regulated discharges from Pond 1A of the Whitman No. 2 Surface Mine into the unnamed tributary of Newsome Branch.

Alex Energy constructed Fill Number 2 of the Whitman No 2 Surface Mine in Left Fork of Rothwell Branch of Whitman Creek. Alex Energy constructed Pond 2A at that mine in the Left Fork of Rothwell Branch to treat discharges from Fill Number 2. In the Right Fork of Rothwell Branch, Alex Energy constructed Fill Number 5 and Pond 2 to treat the discharge from that fill. Discharges from Pond 2 flowed through Pond 2A prior to entering Rothwell Branch. Outfall 002 of WV/NPDES Permit WV1008277 regulated discharges from Pond 2A into Rothwell Branch.

Discharge monitoring reports submitted by Alex Energy under the terms of WV/NPDES Permit WV1008277 reveal that Alex Energy has historically discharged selenium into an unnamed tributary of Newsome Branch (from Outfall 001 of WV/NPDES Permit WV1008277) and Rothwell Branch (from Outfall 002 of WV/NPDES Permit WV1008277) in amounts that violated water quality

standards. Those discharges occurred between April 2007 and April 2014 at Outfall 001 and between January 2007 and November 2011 at Outfall 002. Appendix A to this notice sets forth the instances where Alex Energy has reported selenium concentrations at Outfall 001 and 002 that exceed the numeric selenium water quality criteria.

The only potential source of selenium to Outfall 001 of WV/NPDES Permit WV1008277 is Fill Number 1. The only two potential sources of selenium to Outfall 002 of WV/NPDES Permit WV1008277 are Fill Number 2 and Fill Number 5. Because the selenium concentration from Outfall 002 well downstream of Fill Number 2 and Fill Number 5 exceeded the acute selenium water quality criterion on at least four occasions between January 2007 and November 2011, Sierra Club has concluded that both fills must be discharging selenium.

Based on Alex Energy's discharge monitoring reports, Sierra Club sent Alex Energy a 60-day notice of its intent to sue Alex Energy for violations of the CWA and SMCRA. Specifically, Sierra Club asserted that Alex Energy was discharging effluent from Outfalls 001 and 002 that was causing violations of the instream water quality standards for selenium in an unnamed tributary of Newsome Branch and Rothwell Branch, in violation of the terms and conditions of WV/NPDES Permit WV1008277, the CWA, SMCRA, WVSCMRA, the regulations under SMCRA and WVSCMRA, and Surface Mining Permit Number S505389. By letter dated June 20, 2012, Alex Energy represented to Sierra Club that Outfall 002 was removed and that, therefore, Outfall 002 was no longer a point source discharge. On July 16, 2012, Sierra Club filed an action in the United States District Court for the Southern District of West Virginia, asserting three claims for relief based on Alex Energy's discharges of selenium from Outfall 001 and Outfall 003. Based on Alex Energy's June 20, 2012 representation, Sierra Club did not allege violations at Outfall 002.¹ On February 15, 2013, Alex Energy objected to Sierra Club's request to permit entry to sample Outfall 001 regulated by WV/NPDES Permit WV1008277 "on the grounds that Outfall 001 has been fully reclaimed."

Pursuant to a FRCP 34 Request to Permit Entry, Sierra Club inspected Fill Number 1 and the location of former Pond 1A on six consecutive days from July 8, 2013 through July 13, 2013. Sierra Club retained environmental consultant Downstream Strategies to conduct water sampling in the unnamed tributary of

¹ Since that time, Sierra Club has confirmed that Outfall 002 was deleted from WV/NPDES Permit WV1008277 at least by the time the permit was reissued on January 7, 2013.

² In the event that the unnamed tributary of Newsome Branch in which Fill Number 1 is constructed is not considered a water of the United States, then that

Newsome Branch in which Fill Number 1 is constructed at two locations: downstream of the former location of Pond 1A and immediately downstream of Fill Number 1. The results of that sampling are shown in Appendix B to this notice. The selenium concentrations in Newsome Branch downstream of the former location of Pond 1A ranged from 5.1 µg/L to 7.4 µg/L. The selenium concentrations in Newsome Branch at the toe of Fill Number 1 ranged from 7.6 µg/L to 11 µg/L. The four-day average selenium concentration in Newsome Branch downstream of the former location of Pond 1A was 5.95 µg/L between July 8 and 11, 2013, was 6.325 µg/L between July 9 and 12, 2013, and was 6.75 µg/L between July 10 and 13, 2013. The four-day average selenium concentration at the toe of Fill Number 1 was 8.9 µg/L between July 8 and 11, 2013, was 9.5 µg/L between July 9 and 12, 2013, and was 10.075 µg/L between July 10 and 13, 2013.

Because Outfall 001 and Pond 1 are no longer in the unnamed tributary to Newsome Branch, selenium discharges from Fill Number 1 are no longer flowing through Outfall 001. Likewise, because Outfall 002 and Ponds 2 and 2A are no longer in Rothwell Branch, then the selenium discharges from Fill Number 2 and Fill Number 5 are no longer flowing through Outfall 002. Moreover, WVDEP deleted Outfall 001 from WV/NPDES Permit through Modification No. 14 on October 20, 2014, and deleted Outfall 002 from that permit at least by that permit's reissuance on January 7, 2013. That, however, does not absolve Alex Energy of liability. This letter is intended to provide Alex Energy notice that Sierra Club intends to bring a citizen suit alleging that, if Alex Energy is no longer discharging through Outfalls 001 and 002, then it is discharging selenium directly from Fill Number 1, Fill Number 2, and Fill Number 5 into jurisdictional waters without a permit, and that those discharges violate both the CWA and SMCRA. Those violations have been continuing since the time that Outfalls 001 and 002 were deleted from WV/NPDES Permit WV1008277.

II. CLEAN WATER ACT VIOLATIONS

Section 301 of the CWA prohibits the discharge of any pollutant from a point source to a navigable water except when in compliance with a permit. 33 U.S.C. § 1311. Selenium has been designated a toxic pollutant by the US EPA. 40 C.F.R. § 401.15. The unnamed tributary of Newsome Branch in which Fill Number 1 is located, the Left Fork of Rothwell Branch in which Fill Number 2 is located, and the Right Fork of Rothwell Branch in which Fill Number 5 is located are navigable waters of the United States.

The prohibition against discharges of pollutants into navigable waters without a permit applies to post-mining discharges. West Virginia Highlands Conservancy v. Huffman, 625 F.3d 159, 165 (4th Cir. 2010). The Huffman court

stated that the U.S. Environmental Protection Agency in its 1985 regulations (50 Fed. Reg. 41296):

“reemphasize[d] that post-bond release discharges are subject to regulation under the Clean Water Act,” observing that “[i]f a point source discharge occurs after bond release, then it must be regulated through an NPDES permit.” *Id.* at 41298. The comments to the rule sharpen this point, flatly stating that “[a]ny point source discharge after bond release does require a permit.” *Id.* at 41304 (emphasis added). To the extent parties do not comply, the regulations state that they will be “subject to enforcement action by EPA under section 309 of the Act and by citizens under section 505(a)(1) of the Act.” *Id.* at 41298.

625 F.3d at 166.

Fill Number 1, Fill Number 2, and Fill Number 5 are point sources as that term is used in the context of the CWA. 33 U.S.C. § 1362(14). The fills convey discharges of groundwater and surface water into the streams in which they were constructed at or near their toes. Because of (1) the extremely high selenium concentrations in Alex Energy’s effluent reported by the company from Outfall 001 and 002, (2) the results of the July 2013 FRCP 34 site inspection, and (3) the nature of valley fills, Sierra Club has a good faith belief that Fill Number 1, Fill Number 2, and Fill Number 5 are discharging selenium into an unnamed tributary of Newsome Branch, the Left Fork of Rothwell Branch, and the Right Fork of Rothwell Branch, respectively, each and every time water flows from the toes of those fills. Accordingly, with regard to Fill Number 1, Alex Energy is discharging a pollutant (selenium) from a point source (Fill Number 1) into waters of the United States (an unnamed tributary of Newsome Branch) without a permit, and does so every time water flows from the toes of the fill.² Likewise, with regard to Fill Number 2 and Fill Number 5, Alex Energy is discharging a pollutant (selenium) from point sources (Fill Number 2 and Fill Number 5) into waters of the United States (Left Fork of Rothwell Branch and Right Fork of Rothwell Branch, respectively) without a permit, and does so every time water flows from the toes of the fills.³ Fill Number 1, Fill Number 2, and Fill Number 5 are not

² In the event that the unnamed tributary of Newsome Branch in which Fill Number 1 is constructed is not considered a water of the United States, then that unnamed tributary is itself a point source that conveys pollutants from the toe of Fill Number 1 to Newsome Branch.

³ In the event that Right Fork and/or Left Fork of Rothwell Branch are not considered a water of the United States, then they themselves are point sources that convey pollutants from the toes of Fill Number 2 and Fill Number 5 to

permitted point sources under WV/NPDES Permit WV1008277 or any other WV/NPDES permit, and have not been since Outfalls 001 and 002 were deleted from that permit. Accordingly, those discharges violate Section 301 of the CWA and are actionable in a citizen suit under Section 505 of the Act.

III. SURFACE MINING VIOLATIONS

Section 502(a)(1) of SMCRA authorizes citizens to commence civil actions against any person alleged to be in violation of rules, orders, or permits issued pursuant to SMCRA. 30 U.S.C. § 1270(a)(1). The Sierra Club alleges that Alex Energy is in continuous and ongoing violation of the following:

- (1) 38 C.S.R. § 2-14.5, promulgated under the State Act;
- (2) 30 C.F.R. §§ 816.41(a) and 817.41(a), promulgated under SMCRA;
- (3) 38 C.S.R. § 2-14.5.b, promulgated under the State Act;
- (4) 30 C.F.R. §§ 816.42 and 817.42, promulgated under SMCRA; and
- (5) The permit conditions incorporated into West Virginia Surface Mining Permits S505389 by operation of 38 C.S.R. § 2-3.33.c, promulgated under the State Act.

Alex Energy's SMCRA-related violations began at least in January 2007, when its discharges from the Whitman No. 2 Surface Mine caused the violation of the selenium water quality standards, recurred on each of the dates that the discharges identified in Appendices A and B occurred, and have continued since that time.

A. BACKGROUND

In 1977, Congress enacted SMCRA in order to "assure that surface coal mining operations are so conducted as to protect the environment." 30 U.S.C. § 1202(d). SMCRA encourages "cooperative federalism" by allowing states to adopt their own programs for the regulation of mining, so long as those programs are as stringent as the federal program. See generally 30 U.S.C. § 1253. The Secretary of the Department of the Interior, charged with implementing SMCRA, has approved West Virginia's state mining regulation program. See 30 C.F.R. § 948.10. Consequently, West Virginia regulates mining operations in this state under article 3 of chapter 22 of the West Virginia Code and issues surface mining permits consistent with that statute.

To serve the statutory goal of environmental protection, SMCRA and the State Act impose performance standards on mining operations. Those standards are codified in 40 C.F.R. Parts 816 and 817, and 38 C.S.R. § 2-14. Alex Energy's violation of the performance standards will be the basis of any citizen suit under SMCRA.

As discussed above, Alex Energy is discharging unlawful quantities of selenium into an unnamed tributary of Newsome Branch and the Left Fork and Right Fork of Rothwell Branch from Fill Number 1, Fill Number 2, and Fill Number 5 of its Whitman No. 2 Surface Mine (Surface Mining Permit S505389). The relevant facility is located in Logan County, West Virginia.

B. ALEX ENERGY'S MINING OPERATIONS HAVE RESULTED IN WATER QUALITY STANDARDS VIOLATIONS

The federal performance standards under SMCRA mandate that all discharges from permitted mining operations "be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. Part 434." 40 C.F.R. §§ 816.42 & 817.42. The regulations under the State Act prescribe a similar standard: "Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards." 38 C.S.R. § 2-14.5.b (emphasis added).

Discharge monitoring reports reveal that Alex Energy has discharged selenium from Fill Number 1, Fill Number 2, and Fill Number 5 in amounts that have caused or contributed to violations of the chronic and acute selenium water quality standards for that pollutant. Moreover, data from six consecutive days of sampling in Newsome Branch, conducted in July 2013 as part of the FRCP 34 inspection, reveal that Alex Energy's discharges from Fill Number 1 caused instream violations of the chronic selenium water quality standard. Consequently, Alex Energy is in violation of the federal and state performance standards regarding surface water discharges and is subject to a citizen suit under SMCRA.

Moreover, Alex Energy has a legal duty to treat its effluent to ensure that it does not violate water quality standards. Federal performance standards require that, "[i]f drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls." 40 C.F.R. § 816.41(d)(1); see also 38 C.S.R. § 2-14.5.c ("Adequate

facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with the requirements of subdivision 14.5.b of this subsection.”). Alex Energy has stated that it is no longer treating discharges from Fill Number 1, Fill Number 2, and Fill Number 5. Thus, there is no question that Alex Energy’s existing treatment methods are insufficient to meet that requirement. Consequently, Alex Energy is in violation of the performance standard that requires it to construct systems that will effectively treat its effluent to levels that comply with all applicable water quality standards.

C. ALEX ENERGY IS IN ONGOING AND CONTINUING VIOLATION OF THE CONDITIONS OF WEST VIRGINIA SURFACE MINING PERMIT S505389

Under the State Act, all of the performance standards set forth in the West Virginia Surface Mining Rule—including the performance standards discussed above—are incorporated as conditions in every permit issued under the act. 38 C.S.R. § 2-3.33.c. Alex Energy’s Surface Mining Permit S505389 regulates the Whitman No. 2 Surface Mine and Fill Number 1, Fill Number 2, and Fill Number 5. By operation of 38 C.S.R. § 2-33.c, that surface mining permit incorporates the performance standards discussed in Section III.B *supra*. The upshot of that incorporation is that Alex Energy’s unlawful discharges and its failure to adequately treat its effluent are subject to regulation under the terms of its surface mining permit.

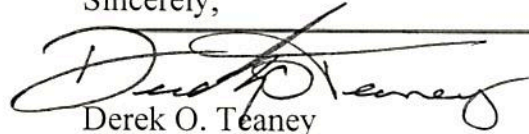
As described above, Alex Energy is violating the performance standards that prohibit violations of water quality standards and require adequate treatment. See 40 C.F.R. §§ 816.41-816.42 & 817.41-817.42, 38 C.S.R. §§ 2-14.5 & 2-14.5.b. Consequently, it is simultaneously violating the conditions of Surface Mining Permit S505389 and is subject to a citizen suit under SMCRA.

IV. CONCLUSION

As discussed above, if Alex Energy fails to come into compliance with the Clean Water Act, SMCRA, surface mining regulations, and the conditions of Surface Mining Permit S505389, Sierra Club intends to file a citizen suit under section 505(a)(1) of the Clean Water Act seeking civil penalties and injunctive relief, as well as a citizen suit under section 520(a)(1) of SMCRA seeking a court order compelling Alex Energy to come into compliance with the law. Sierra Club further reserves the right to seek civil penalties for any further violations of the CWA stemming from the issues identified herein that have occurred since November 2011 or that occur in the future. See Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995).

If Alex Energy has taken any steps to eradicate the underlying cause of the violations identified herein, or if it believes that anything in this letter is inaccurate, please let us know. If we are not advised of any remedial steps during the 60-day period, we will assume that no such steps have been taken and that violations are likely to continue. Additionally, we would be happy to meet with you or your representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,



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Appalachian Mountain Advocates
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cc (via certified mail, return receipt requested):

The Honorable Randy Huffman
Secretary
West Virginia Department of Environmental Protection

601 57th Street
Charleston, WV 25304

The Honorable Shawn M. Garvin
Regional Administrator
U.S. Environmental Protection Agency Region III
1650 Arch Street
Philadelphia, PA 19103-2029

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
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The Honorable Sally Jewell
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The Honorable Joseph Pizarchik
Director
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1951 Constitution Avenue, N.W.
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Corporation Service Company
Registered Agent
Alex Energy, Inc.
209 West Washington Street
Charleston, WV 25302

(via first class mail):
The Honorable Thomas Shope
Regional Director
Office of Surface Mining
Appalachian Regional Coordinating Center
3 Parkway Center
Pittsburgh, PA 15220

APPENDIX A

EXCURSIONS ABOVE SELENIUM WATER QUALITY STANDARDS BY DISCHARGES REGULATED BY WV/NPDES PERMIT WV1008277

OUTFALL 001

DATE	UNITS	MEASURED VALUE
April 2007	µg/l	8
July 2008	µg/l	6.86
September 2008	µg/l	13.9
November 2008	µg/l	7.93
December 2008	µg/l	7.56
January 2009	µg/l	6.05
January 2009	µg/l	6.31
February 2009	µg/l	6.27
February 2009	µg/l	6.42
April 2010	µg/l	8.07
October 2010	µg/l	5.39
January 2011	µg/l	8.26
July 2011	µg/l	6.42
July 2011	µg/l	8.29
September 2011	µg/l	7.49
November 2011	µg/l	8.76
April 2014	µg/l	5.66
April 2014	µg/l	9.12

OUTFALL 002

DATE	UNITS	MEASURED VALUE
January 2007	µg/l	7
January 2007	µg/l	8
February 2007	µg/l	9.64
February 2007	µg/l	9.92
April 2007	µg/l	9
November 2007	µg/l	6.77
December 2007	µg/l	9.36
January 2008	µg/l	5.68
January 2008	µg/l	8.03
February 2008	µg/l	21
March 2008	µg/l	6.61
March 2008	µg/l	11.6
April 2008	µg/l	7.6
April 2008	µg/l	9.08
May 2008	µg/l	10.7
June 2008	µg/l	7.76
June 2008	µg/l	8.22
July 2008	µg/l	6.65

July 2008	µg/l	10.3
August 2008	µg/l	13.6
September 2008	µg/l	10
September 2008	µg/l	14.8
October 2008	µg/l	8.21
December 2008	µg/l	11.4
January 2009	µg/l	9.95
February 2009	µg/l	11.2
March 2009	µg/l	8.83
March 2009	µg/l	10.5
April 2009	µg/l	9.54
September 2009	µg/l	10.3
September 2009	µg/l	27
November 2009	µg/l	9.88
December 2009	µg/l	6.09
December 2009	µg/l	15.1
January 2010	µg/l	13.5
February 2010	µg/l	9.09
March 2010	µg/l	5.79
March 2010	µg/l	10.5
April 2010	µg/l	9.42
April 2010	µg/l	16.7
May 2010	µg/l	6.23
May 2010	µg/l	6.72
November 2010	µg/l	6.96
December 2010	µg/l	8.7
December 2010	µg/l	29.6
January 2011	µg/l	9.73
January 2011	µg/l	12.2
February 2011	µg/l	8.03
February 2011	µg/l	16.1
March 2011	µg/l	6.89
April 2011	µg/l	8.19
April 2011	µg/l	31.1
May 2011	µg/l	17.5
June 2011	µg/l	14.5
July 2011	µg/l	6.12
July 2011	µg/l	7.28
August 2011	µg/l	5.8
August 2011	µg/l	11.9
September 2011	µg/l	6.74
November 2011	µg/l	6.73

APPENDIX B -- SELENIUM CONCENTRATIONS IN UNNAMED TRIBUTARY OF NEWSOME BRANCH

	7/8/13	7/9/13	7/10/13	7/11/13	7/12/13	7/13/13	Average, July 8 to 11, 2013	Average, July 9 to 12, 2013	Average, July 10 to 13, 2013
Downstream of Former Location of Pond 1A	5.1	5.5	7.4	5.8	6.6	7.2	5.95	6.325	6.75
Toe of Fill Number 1	7.6	8.7	9.8	9.5	10	11	8.9	9.5	10.075

ALL CONCENTRATIONS REPORTED IN MICROGRAMS PER LITER



APPALACHIAN MOUNTAIN ADVOCATES

Great Horned Owl © Estate of Roger Tony Peterson

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February 17, 2015

Steven R. Poe
President, White Flame Energy, Inc.
Manager, Premium Energy, LLC
P.O. Box 1098
Holden, WV 25625

By Certified Mail – Return Receipt Requested

Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Violation of Terms and Conditions of West Virginia NPDES Permit WV1020579, or for Unpermitted Discharges, and 60-Day Notice of Intent to File Citizen Suit Under the Federal Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations of Federal and State Regulations and Permit Conditions of West Virginia Surface Mining Permit S501501

Dear Mr. Poe:

The Sierra Club, Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy (collectively, “the Groups”), in accordance with section 505 of the Clean Water Act (the “Act” or the “CWA”), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, hereby notify you that White Flame Energy, Inc. (“White Flame”)¹ has violated, and continues to violate, “an effluent standard or limitation” under Section 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), by failing to comply with the terms and conditions of West Virginia/National Pollution Discharge Elimination System (“WV/NPDES”) Permit WV1020579. If within sixty days of the postmark of this letter White Flame does not bring itself into full compliance with the Act, we intend to file a citizens’ suit seeking civil penalties for White Flame’s ongoing and continuing violations and for an injunction compelling it to come into compliance with the Act.

We further notify you, in accordance with section 520 of the federal Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, that White Flame is in ongoing and continuing violation of certain federal and state regulations promulgated under SMCRA and the West Virginia Surface Coal Mining and Reclamation Act (“WVSCRMA” or the “State Act”) and certain permit conditions of its West Virginia Surface Mining Permit S501501 as a result of its discharges of pollutants into Slate Branch, Curry

¹ White Flame Energy, Inc. is the holder of WV/NPDES Permit WV1020579 and Surface Mining Permit S501501. According to the West Virginia Secretary of State’s Office, White Flame Energy, Inc. merged with and into Premium Energy, LLC in December 2013. This letter is also being sent to Premium Energy, LLC.

Branch, and Big Pigeonroost Branch, all of Rockhouse Fork of Pigeon Creek of the Tug Fork River and into Evans Ferrell Branch of Pigeon Creek of the Tug Fork River. If, within sixty days, White Flame does not bring itself into full compliance with SMCRA, the regulations promulgated under SMCRA and the WVSCMRA, and Surface Mining Permit S501501, we intend to file a citizens' suit in federal court seeking an injunction compelling White Flame to come into compliance with the applicable statutes, regulations, and permits.

I. FACTUAL BACKGROUND

On May 20, 2003, WVDEP issued West Virginia Surface Mining Permit S501501 to White Flame for Surface Mine No. 10 in Mingo County, West Virginia. This permit has been revised a number of times, most recently in 2014, and remains in effect. On July 22, 2003, WVDEP issued WV/NPDES Permit WV1020579 to White Flame for this mine. This permit has since been modified a number of times, most recently in 2011, and remains in effect.

On Surface Mine No. 10, Valley Fill No. 1 was constructed in Slate Branch, drains into Pond No. 1, and discharges through Outlet 005 into Slate Branch. Valley Fill No. 2 was constructed in Evans Ferrell Branch, drains into Pond No. 2, and discharges through Outlet 047 into Evans Ferrell Branch. Valley Fill No. 3 was constructed in an unnamed tributary of Evans Ferrell Branch, drains into Pond No. 3, and discharges through Outlet 045 into the unnamed tributary of Evans Ferrell Branch. Valley Fill No. 4 was constructed in Big Pigeonroost Branch, drains into Pond No. 4, and discharges through Outlet 031 into Big Pigeonroost Branch. Valley Fill No. 6A was constructed in Curry Branch, drains into Pond No. 6, and discharges through Outlet 012 into Curry Branch. WV/NPDES Permit WV1020579 has never been assigned selenium limits or monitoring.

Part C of the WV/NPDES Permit WV1020579 incorporates by reference 47 CSR § 30-5.1.f, which provides that: "The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47CSR2." West Virginia has established specific numeric criteria for selenium in order to protect the biologic integrity of streams and the maintenance of aquatic life. Those standards include a chronic criterion of 5 µg/L and an acute criterion of 20 µg/L. 47 C.S.R. § 2, App. E, Table 1, § 8.27.

Recent water sampling shows that Slate Branch, Evans Ferrell Branch, Big Pigeonroost Branch, and Curry Branch are contaminated by elevated levels of selenium. WVDEP's Watershed Assessment Branch took water samples in the receiving streams of WV/NPDES Permit WV120579 on October 22, 2013. The results of that sampling effort showed the following selenium concentrations:

Stream	Latitude	Longitude	Selenium Concentration (µg/L)
Slate Branch	37.70294444	-82.16572222	10.1
Evans Ferrell Branch	37.67561111	-82.17316667	38.4
Big Pigeonroost Branch	37.69944444	-82.12497222	9.5
Curry Branch	37.70211111	-82.15105556	7.5

White Flame submitted water samples taken in February 2013 from instream Outlets 005, 012, 031, 045, and 047 with its reissuance application submitted on March 25, 2013. The selenium concentrations in those samples were as follows:

Outlet	Selenium Concentration (µg/L)	Receiving Stream
005	17.20	Slate Branch
012	7.38	Curry Branch
031	10.85	Big Pigeonroost Branch
045	20.02 ²	Evans Ferrell Branch
047	10.2 ³	UNT/Evans Ferrell Branch

All of those samples showed selenium concentrations that exceed West Virginia's chronic water quality standard for selenium. The sample in Evans Ferrell Branch and the sample from outlet 045 into Evans Ferrell Branch exceed West Virginia's acute water quality standard for selenium.

II. LEGAL CLAIMS

A. CLEAN WATER ACT VIOLATIONS

Section 301 of the CWA prohibits the discharge of any pollutant by any person, except in compliance with a permit. The WV/NPDES permits at issue in this notice allow White Flame to discharge specified pollutants into West Virginia's waters. Noncompliance with an NPDES Permit constitutes a violation of the CWA. Sierra Club v. Powellton Coal Co., LLC, 662 F. Supp. 2d 514, 516 (S.D. W. Va. 2009). Citizens may sue any person who violates a term or condition of an NPDES Permit. Id. at 517. White Flame's WV/NPDES Permit prohibits discharges that cause or materially contribute to violations of applicable water quality standards. 47 C.S.R. § 30-5.1.f.

White Flame's discharges into Slate Branch, Curry Branch, Big Pigeonroost Branch, Evans Ferrell Branch, and UNT/Evans Ferrell Branch have caused or materially contributed to violations of the chronic numeric standard for selenium in each of the above streams. Outlets 005, 012, 031, 045, and 047 are instream outlets, meaning their discharge constitutes the entire stream at the point of discharge. There are no other point sources contributing selenium to Slate Branch, Curry Branch, Evans Ferrell Branch, and UNT/Evans Ferrell Branch, other than White Flame's on-bench outfalls regulated by WV/NPDES Permit WV1020579. There are other sources of selenium to Big Pigeonroost Branch downstream of outlet 031, but outlet 031 is causing exceedances of the chronic selenium water quality standard on its own. White Flame's discharges into Evans Ferrell Branch and UNT/Evans Ferrell Branch have caused or materially

² The application lists this sample with a concentration of 38.29 µg/L, but the attached lab sheet lists it at 20.02 µg/L. Either concentration exceeds West Virginia's acute water quality standard for selenium.

³ The application lists this sample with a concentration of 24.14 µg/L, but the attached lab sheet lists it at 10.2 µg/L. Either concentration exceeds West Virginia's chronic water quality standard for selenium. The concentration typed into the application exceeds West Virginia's acute water quality standard for selenium.

contributed to violations of the acute numeric standard for selenium in Evans Ferrell Branch. The Groups allege that the elevated selenium levels found in Slate Branch, Curry Branch, Big Pigeonroost Branch, Evans Ferrell Branch, and UNT/Evans Ferrell Branch are the result of discharges from WV/NPDES Permit WV1020579. Based on the available evidence and the absence of any corrective measures by White Flame since the samples were taken, we believe White Flame's violations to be ongoing. If White Flame does not cease those violations within 60 days, we intend to bring a citizen suit against White Flame under Section 505 of the Clean Water Act.

B. SURFACE MINING VIOLATIONS

Section 520(a)(1) of SMCRA authorizes citizens to commence civil actions against any person alleged to be in violation of rules, orders, or permits issued pursuant to SMCRA. 30 U.S.C. § 1270(a)(1). West Virginia has a federally-approved mining program under SMCRA which is administered by the WVDEP pursuant to the West Virginia Surface Coal Mining Reclamation Act ("WVSCMRA"), W. Va. Code § 22-3-1 through 32a. Powellton, 662 F. Supp. at 518. Violations of a federally-approved state program are enforceable in federal court under SMCRA's citizen suit provision. Molinary v. Powell Mountain Coal Co., Inc., 125 F.3d 231, 237 (4th Cir. 1997). The Groups allege that White Flame is in continuous and ongoing violation of the following:

- (1) 38 C.S.R. § 2-14.5, promulgated under WVSCMRA;
- (2) 30 C.F.R. §§ 816.41(a) and 817.41(a), promulgated under SMCRA;
- (3) 30 C.F.R. §§ 816.42 and 817.42, promulgated under SMCRA;
- (4) The permit conditions incorporated into West Virginia Surface Mining Permit S501501 by operation of 38 C.S.R. § 2-3.33.c, promulgated under WVSCMRA.

White Flame's SMCRA-related violations began at least in February 2013, when its discharges from its Surface Mine No. 10 began causing violations of the selenium water quality standards.

Section 506 of SMCRA prohibits surface coal mining operations without a permit from the Office of Surface Mining Reclamation and Enforcement ("OSMRE") or from an approved state regulatory authority. 30 U.S.C. § 1256. White Flame holds mining permit S501501 from WVDEP for Surface Mine No. 10. The WVSCMRA provides that "[a]ny permit issued by the director pursuant to this article to conduct surface mining operations shall require that the surface mining operations meet all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the director." W. Va. Code § 22-3-13(a). In turn, WVDEP's regulations under that statute provide that "[t]he permittee shall comply with the terms and conditions of the permit, all applicable performance standards of the Act, and this rule." 38 C.S.R. § 2-3.33.c; Powellton, 662 F. Supp.2d at 518.

The federal performance standards under SMCRA mandate that all discharges from permitted mining operations "be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. Part 434. 30 C.F.R. §§ 816.42 & 817.42. The State program prescribes a similar standard: "Discharge from areas disturbed by

surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards.” 38 C.S.R. § 2-14.5.b (emphasis added).

As described above, White Flame’s discharges from Surface Mine No. 10 into Slate Branch, Curry Branch, Big Pigeonroost Branch, Evans Ferrell Branch, and UNT/Evans Ferrell Branch have caused violations of the chronic numeric standard for selenium and its discharges into Evans Ferrell Branch and UNT/Evans Ferrell Branch have caused violations of the acute numeric standard for selenium. Consequently, White Flame is in violation of the state and federal performance standards that prohibit mining operations from causing violations of water quality standards.

In addition, White Flame’s mining operations have resulted in impermissible material damage to the hydrologic balance. The performance standards under WVSMCRA mandate that “[a]ll surface mining and reclamation activities shall be conducted . . . to prevent material damage to the hydrologic balance outside the permit area.” 38 C.S.R. § 2-14.5. At a minimum, “material damage” includes violations of water quality standards. Ohio River Valley Environmental Coalition, Inc. v. Castle, Civ. No. 3:00-cv-0058, Memo. Opinion & Order at 12-13 (S.D. W. Va. June 14, 2000). Accordingly, the water quality standards violations described above constitute material damage to the hydrologic balance and are actionable in a SMCRA citizen suit against White Flame.

Moreover, White Flame has a legal duty to treat its effluent to ensure that it does not violate water quality standards. Federal and State performance standards require that, “[i]f drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls.” 30 C.F.R. § 816.41(d)(1); see also 38 C.S.R. § 2-14.5.c (“Adequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with the requirements of subdivision 14.5.b of this subsection.”) The violations identified herein show unequivocally that White Flame’s existing treatment methods are insufficient to meet that requirement. Thus, the performance standards require White Flame to construct systems that will effectively treat its effluent to levels that comply with all applicable water quality standards.

Finally, White Flame’s violations of the performance standards that prohibit violations of water quality standards and material damage and that require adequate treatment to avoid such violations are violations of Surface Mining Permit S501501. By operation of 38 C.S.R. § 2-33.c, that surface mining permit incorporates the performance standards discussed in this letter as terms of the permit itself. Consequently, White Flame is violating its SMCRA permit.

III. CONCLUSION

As discussed above, if White Flame fails to come into compliance with the Clean Water Act; the terms of WV/NPDES Permit WV1020579; SMCRA; surface mining regulations; and the permit conditions of Surface Mining Permit S501501, we intend to file a citizen suit under

section 505(a)(1) of the Clean Water Act seeking civil penalties and injunctive relief, as well as a citizen suit under section 520(a)(1) of SMCRA seeking a court order compelling White Flame to come into compliance with the law. Be aware that this notice is sufficient to allow us to sue White Flame for any post-notice violations related to the violations described herein. See generally, Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995).

If White Flame has taken any steps to eradicate the underlying cause of the violations described above, or if White Flame believes that anything in this letter is inaccurate, please let us know. If White Flame does not advise us of any remedial steps or inaccuracies in our information during the 60-day period, we will assume that no such steps have been taken, the information in this letter is accurate, and that violations have occurred and are likely to continue. Additionally, we would be happy to meet with White Flame or its representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,



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